Rezension: Wolfang Wurmnest, Marktmacht und Verdrängungsmissbrauch: eine rechtsvergleichende Neubestimmung des Verhältnisses von Recht und Ökonomik in der Missbrauchsaufsicht über marktbeherrschende Unternehmen (Tübingen, 2012)

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Wolfgang Wurmnest, *Marktmacht und Verdrängungsmissbrauch – Eine rechtsvergleichende Neubestimmung des Verhältnisses von Recht und Ökonomik in der Missbrauchsaufsicht über marktbeherrschende Unternehmen*, Tübingen: Mohr Siebeck, 2010. 698 + XXIX pages. ISBN 978-3-16-150513-3

The more economic approach has changed competition law, most notably in the field of vertical agreements, merger control and unilateral conduct. It is the latter area *Wolfgang Wurmnest* deals with in his Hamburg habilitation thesis. Whereas in the past the criterion of fairness prevailed, separating legal and illegal conduct according to the form of the behaviour in question, the effect on (consumer) welfare now has taken centre stage. Behaviour that was condemned in the past may prove beneficial today. The author analyses recent developments and pleads in favour of a more evolutionary than revolutionary interpretation of this development. He accepts taking into account efficiency on the level of justification but rejects the reduction of competition law's goals to efficiency and consumer welfare as the sole goal. Instead, he underlines the importance of the concept of economic freedom and of the process of rivalry between competing firms. Thus, he is in line with recent case law of the European Court of Justice according to which European competition law does not only pursue the immediate interests of consumers but has 'to protect the structure of the market and thus competition as such' (*T-Mobile Netherlands*, *GlaxoSmithKline Services Unlimited*). The position of the author may be described as a 'moderate' effects based approach. The welfare effect is given broad space (even more in the scrutiny of specific problems than on the conceptual basis), but it is not the only and immediate goal of competition law. There is room for other goals, for example market integration in the EU/EEA internal market.

The study is broadly conceived and includes the history of competition law in the USA, the European Union and in Germany with respect to unilateral conduct. Although the wording of Section 2 Sherman Act reflects the anti-monopolistic impetus of the past, it is long-established in US antitrust law that only exclusionary conduct is covered. Hence, there is no fundamental difference to the concept of 'abuse' in European law. The author pleads in favour of the maintenance of market definition for the purpose of establishing dominance. He examines alternative concepts but does not see the time come for a direct determination of market power. The book does not only give a full account of the economics of competition law but makes a critical selection for the purpose of practical application.

The author applies his general findings to two particular forms of exclusionary conduct, i.e. predatory pricing and fidelity rebates. Although predatory pricing is considered anticompetitive both in the US and the EU, the conditions for a competition law violation are different. The most prominent (but not the only) difference is *Robert Bork's* recoupment test which is required by US but not by European courts. In the US, plaintiffs have not only to show that the competitor's prices are below an appropriate measure of cost, but that there is a reasonable prospect of recouping losses in a foreseeable future. By contrast, the European Court of Justice renounces on a complete predation-recoupment story. It is sufficient to show prices below cost (with nuanced rules for prices under average variable and total costs; in single cases even prices above cost have been qualified abusive). The author points to the procedural reasons for this difference: In the US, the recoupment criterion serves as a filter against excessive law suits and allows keeping the jury out. In Europe, substantive law has not to respond to the risk of blackmail suits since the institutional setting is different. Therefore, it is sufficient to show plausibility of recoupment.

As regards rebates, the author identifies over-inclusive enforcement in the EU. In his view, economic theory showing procompetitive effects of rebate schemes considered suspicious so far has to be given greater weight. The effects on competition have to be assessed more thoroughly without following US law completely. Whereas US law looks at rebates from the perspective of predatory pricing, European law takes into account the close relationship of

certain rebates with exclusive purchasing agreements. The author distinguishes different kinds of rebates and focuses on the most dangerous ones, especially retroactive rebates as opposed to functional or quantity discounts. He applies his results to specific cases, for example the *Intel* case. In its 2009 decision, the European Commission held that *Intel*'s rebates were abusive since they foreclosed an as efficient competitor. According to the author, the decision of the General Court in the *Intel* case will depend on the question if a detailed price/cost-analysis is necessary, and, if so, whether the dominant firm was able to estimate the contestable portion of its products without access to information in the hands of the competitor or of customers. It would have been interesting to have the author's view on related problems, for example on margin squeeze where a comparable transatlantic divergence exists. But it is understandable that the author prioritises predatory pricing and rebates which allows him an analytical depth unparalleled (not only) in German literature.
The author most brilliantly reveals the inability of unrealistic, Chicago style thinking to grasp the harmful potential of exclusionary conduct. He warns against the pointed emphasis on the distinction between a form-based and an effects-based approach and against the absolutization of the welfare criterion. With this, he does not plead against taking into account efficiency arguments, but places them on the level of justification. This proposal has the advantage of maintaining legal certainty while allowing a thorough economic examination. At the same time, he underlines the deficiencies of current approaches which – in his view – give static welfare maximization undue preference over a dynamic perspective. One could add that traditional approaches have neglected the dimension of time even more and that effects-based thinking has brought significant progress in this respect. An example is the relationship between competition law and intellectual property rights (IPRs). According to older approaches, the application of competition law had to stop where the contents or the 'specific subject matter' of an IPR was affected. The effects-based approach has allowed overcoming this formal demarcation: It is no longer a priori accepted that the application of the abuse prohibition to IPRs stifles innovation. Instead, an overall assessment has to be made taking into account the impact of competition law application on incentives to innovate not only of the right holder himself but also of follow-on innovators. These reflections show that it would not be justified reproaching the more economic approach for giving undue preference to static thinking. Instead, an encompassing view of the entire legal and economic context will have to include to a large extent the dimension of time. The need of legal certainty has to be satisfied by distinguishing groups of cases and by establishing check-lists indicating as precisely as possible the thin line between abuse and competition on the merits.
Of special importance for this and other contexts is *Frank H. Easterbrook's* error cost framework. The author warns against the unbalanced consideration of type 1 errors (false positives) and calls for taking duly into account the risk of false negatives. Thus, he unveils the dangerous tendency of the error cost approach to underestimate the chilling effect of under-enforcement. Less persuasive is the recommendation against economists on the bench. If we trust lawyers to understand economic theories why not trust economists to understand the law? As the French example shows (with a leading scholar of industrial organization sitting in the Cour de cassation) – and in conformity with a forgotten recommendation in the *Spaak* report – greater diversity in the courts may prove extremely fruitful.
The book provides a profound and masterly written analysis not only of unilateral restraints but also of the relationship between law and economics (including game theory, new institutional, experimental and behavioural economics) in competition policy. It is not possible to trace the numerous ramifications here. A coherent framework with practical recommendations is given. The specific proposals focus on European competition law. In addition, the book gives valuable advice for a reform of German law on unilateral restraints: The author welcomes the existence of stricter rules on the national level but proposes to create a more coherent system. The study is not restricted to substantive law but integrates the

overall context. Particularly impressive is the recurrent reference to institutional differences on both sides of the Atlantic, especially the tempering effect of private (over-)enforcement in the US on the definition of anti-competitive behaviour. The main subject is embedded in a particularly rich context. Based on a multi-faceted approach including the historical, political and comparative dimension, the author does not content himself with giving theoretical answers, but proposes solutions adapted to the institutional setting in Europe. His inquiry illustrates most vividly that identical problems do not necessarily require identical solutions in the world. Thus, *Wolfgang Wurmnest* demonstrates most convincingly how competition law has to adapt to profound changes in economic analysis without giving up the systemic autonomy of law.

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